



# The University of the State of New York

## The State Education Department

State Review Officer

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Nos. 11-059 & 11-061

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Rye City School District**

**Appearances:**

Law Office of Peter D. Hoffman, P.C., attorneys for petitioners, Jamie Mattice, Esq., of counsel

Keane & Beane, P.C., attorneys for respondent, Ralph C. DeMarco, Esq., of counsel

### DECISION

Petitioners (the parents) appeal from an interim and the final decision of an impartial hearing officer which dismissed their claim for tuition reimbursement for the 2007-08 school year, denied their request to be fully reimbursed for their son's tuition costs at the Windward School (Windward) for the 2008-09 school years, and denied their request to be fully reimbursed for their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2009-10 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for the 2008-09 and 2009-10 school years and awarded partial tuition reimbursement to the parents for their son's attendance at Windward and Eagle Hill.<sup>1</sup> The appeal must be dismissed. The cross-appeal must be sustained.

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<sup>1</sup> Although the parents duly and timely served the district with a notice of intention to seek review, the parties nevertheless created a procedural irregularity by initiating separate appeals from the same impartial hearing decision. State regulations governing the procedures for review of the decision of an impartial hearing officer provide for an appeal and a cross-appeal (8 NYCRR 279.4). Upon notice and an opportunity for the parties to be heard, and as a matter of discretion, the two appeals were consolidated by a State Review Officer. Since the parents served a notice of their intention to seek review first, for purposes of this decision, their request for review will be treated as the initiating appeal and the district's request for review shall be deemed a cross-appeal. I encourage counsel for the parties to avoid such unnecessary irregularities in the future. I note that this cautionary guidance has been set forth in State Review Officer decisions (Application of a Student with a Disability, Appeal Nos. 10-120 & 10-121; Application of a Student with a Disability, Appeal Nos. 09-008 & 09-010). State regulations provide that parent-petitioner is typically the first party to initiate activity in filing an appeal with a State Review Officer by serving a notice of intention to seek review upon the district, and is consequently deemed the petitioner. Accordingly, future irregularities may result in the rejection of a respondent's pleading for failure to adhere to the practice regulations and comply with the page limitations set forth in State regulations attendant to setting forth a cross appeal within the answer (8 NYCRR 279.4[b]; 279.8[a][5]).

At the time of the impartial hearing, the student was attending Eagle Hill (Tr. p. 5523). Neither Windward nor Eagle Hill has been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7). The student's eligibility for special education services as a student with a speech or language impairment is not in dispute in these appeals (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

## **Background**

In this case the parties' familiarity with the student's educational history, the voluminous hearing record, and the lengthy impartial hearing officer's decision will be presumed, and so they need not be repeated in detail. Briefly, the student received speech-language therapy and occupational therapy (OT) through the district's Committee on Preschool Special Education (CPSE) (Dist. Ex. 4 at p. 1). In March 2005 the district's Committee on Special Education (CSE) determined that the student was not eligible for special education and related services, but due to the student's "medical background," referred him to a separate committee to determine whether he was eligible for services pursuant to section 504 of the Rehabilitation Act of 1973 (section 504) (Dist. Ex. 4 at p. 2; see 29 U.S.C. §§ 701-796[1]). In June 2005 the section 504 committee determined that the student was eligible to receive accommodations due to his various medical diagnoses, language delay, and impaired fine motor skills that affected his participation in school activities (Dist. Ex. 5 at p. 1).

At the commencement of the 2005-06 school year, the district provided the student's section 504 accommodations including OT, speech-language therapy, and psychological consultation services (Dist. Exs. 5 at p. 1; 48 at p. 1). In November 2005, the district modified the student's section 504 plan by adding program modifications (Dist. Ex. 6 at p. 2). At that time the student's mother indicated that her son was receiving three sessions per week of private speech-language therapy (Dist. Ex. 6 at p. 2).

On May 24, 2006 the section 504 committee convened to develop the student's section 504 plan for the 2006-07 (kindergarten) school year (Dist. Ex. 7). The resultant section 504 plan provided the student with OT, OT consultation services, psychological consultation services, speech-language consultation services, and speech-language therapy (Dist. Ex. 7 at p. 1). The section 504 plan also included certain program modifications (Dist. Ex. 7 at p. 2). At the meeting, the student's private speech-language pathologist suggested that the student would benefit from having an individual aide in the classroom for the upcoming kindergarten year (Dist. Ex. 7 at p. 3). The section 504 committee subsequently referred the student to the CSE (Dist. Ex. 7 at p. 3).

At the commencement of the 2006-07 (kindergarten) school year, the student attended the district's elementary school and received the building-level services of a "shadow" aide, who provided him with support in the classroom on a daily basis (Tr. pp. 1069-70; Dist. Exs. 12 at p. 1; 41 at p. 1).<sup>2</sup> The student received speech-language therapy, and speech-language and psychological consultation services pursuant to the May 2006 section 504 plan (Dist. Ex. 12 at p. 1). The parents declined the OT services offered by the district, and instead obtained private OT services, in addition to his attendance at the "Fast Focus" program, which addressed improving his kindergarten readiness skills (Dist. Ex. 12 at p. 1; Parent Ex. R). During fall 2006, the district

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<sup>2</sup> Testimony in the hearing record reflects that the term "shadow" aide was used interchangeably with the student's "shared" (3:1) aide services (see, e.g., Tr. pp. 863-64, 1069-71, 1397; Dist. Exs. 2 at p. 1; 3 at p. 1).

prepared a social history and conducted psychological, educational, and speech-language evaluations of the student (Dist. Exs. 9; 10; 12; 13). The hearing record reflects that in fall 2006 the parents began considering enrolling the student at Windward (Tr. pp. 3838; Dist. Ex. 57).

On November 28, 2006 the CSE convened for the student's initial review, and following a review of the recent evaluation reports prepared by the district, a March 2006 OT annual review report, a June 2006 private neurological evaluation report, and a May 2006 private speech-language evaluation report, determined that he was eligible for special education and related services as a student with a speech or language impairment (Dist. Ex. 8 at p. 1; see Dist. Exs. 10; 11; 12; 14; 15). For the remainder of the school year, the CSE recommended that the student continue to receive shared (3:1) aide support throughout the day; speech-language therapy, and OT (Dist. Ex. 8 at p. 1). The CSE also recommended speech-language, OT, psychological, and counseling consultation services (Dist. Ex. 8 at p. 6). Program modifications were also included (Dist. Ex. 8 at p. 2).

On May 2, 2007 the CSE convened for the student's annual review (Dist. Ex. 1). The resultant individualized education program (IEP) for the 2007-08 school year offered the student a general education placement with pull-out sessions of 15:1 resource consultant teacher services to support the student's reading decoding needs, and full-time shared aide services (Dist. Ex. 1 at pp. 1-2).<sup>3</sup> The May 2007 CSE also recommended that the student receive OT and speech-language therapy (Dist. Ex. 1 at p. 1). Program modifications recommended by the May 2007 CSE remained essentially the same as those offered in the student's November 2006 IEP (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 8 at p. 2).

Due to the parents' belief that the student required reading instruction using a multisensory, Orton-Gillingham approach, and a "language-based curriculum for every subject," they enrolled the student at Windward for the 2007-08 (first grade) school year, where he received instruction in language arts, mathematics, social studies, science, art, music, and physical education (Tr. pp. 3471-72, 5460; Dist. Exs. 20; 21). On June 19, 2008 the CSE convened for the student's annual review and to develop his 2008-09 IEP (Dist. Ex. 2). The CSE recommended that the student receive a general education program with daily 15:1 resource consultant teacher services, full-time shared aide services, and counseling, speech-language, and OT services (Dist. Ex. 2 at pp. 1-2). Counseling and speech-language consultation services were also offered, as were a variety of program modifications and testing accommodations (Dist. Ex. 2 at pp. 1-3).

The parents continued their son's placement at Windward during the 2008-09 school year (Dist. Ex. 23). On April 28, 2009 the CSE convened for the student's annual review and to develop his 2009-10 IEP (Dist. Ex. 3). The resultant IEP offered the student a special education program and related services similar to those offered to the student the previous school year (compare Dist. Ex. 2 at pp. 1-3, with Dist. Ex. 3 at pp. 1-3).

To address the student's social skill needs and due to the parents' belief that he required a "whole child approach," the student attended Eagle Hill during the 2009-10 school year where he

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<sup>3</sup> The hearing record describes resource consultant teacher services as a special education teacher who provided instruction to groups of students in a ratio not to exceed 15:1 in order to implement IEP goals and collaborated with classroom teachers to reinforce goals in the classroom (Tr. p. 907).

received instruction in language arts, mathematics, writing, oral language, oral literature, social studies, and science (Tr. p. 5460; Parent Ex. QQ).

### **Due Process Complaint Notice**

In a due process complaint notice served on the district August 4, 2009, the parents requested an impartial hearing (IHO Ex. I; see IHO Ex. III at Appx. B). The parents asserted that the May 2007, June 2008, and April 2009 IEPs failed to offer the student a free appropriate public education (FAPE) (IHO Ex. I). Specifically, and as relevant to this appeal, the parents asserted that the district failed to follow the recommendations of their private evaluators with respect to the student's diagnosis and required methodology (id. at pp. 5-7, 9-10); the 2008 CSE was improperly constituted (id. at pp. 5, 23-24); and that Windward staff was prevented from fully participating at the 2008 CSE meeting as the district had predetermined the goals for the 2008 IEP (id. at pp. 11, 23). The parents requested reimbursement for the student's tuition for the 2007-08, 2008-09, and 2009-10 school years (id. at pp. 3, 25).

In a response dated August 14, 2009, the district generally denied the parents' allegations (IHO Ex. II). The district detailed the programs and services it had offered to the student, asserted that it had considered other options and listed the reasons for rejecting them, and concluded that the placements offered for the 2007-08, 2008-09, and 2009-10 school years were appropriate to meet the student's needs (id. at pp. 1-9). Furthermore, the district asserted that the parents' private unilateral placements were not appropriate and that equitable considerations did not weigh in favor of reimbursement (id. at p. 9).

### **The District's Motion to Dismiss**

By motion dated October 15, 2009, the district moved to dismiss the parents' claims for the 2007-08 school year on the grounds that they were time-barred (IHO Ex. III). The parents opposed the district's motion, arguing that they could not have known of the injury until 2009, and cross-moved for a directed verdict in their favor (IHO Ex. IV). Replies (IHO Ex. V) and sur-replies (IHO Ex. VI) were filed, and in an interim decision dated November 29, 2009, the impartial hearing officer granted the district's motion to dismiss the claims relating to the 2007-08 school year and denied the parents' cross-motion for a directed verdict (IHO Ex. VII). The impartial hearing officer found that the parents failed to assert that their claim fell within the regulatory exceptions to the two-year statute of limitations (IHO Ex. VII at p. 4). The impartial hearing officer also found unavailing the parents' argument that they were not aware of the basis for their complaint until a subsequent evaluation resulted in the student receiving a diagnosis of Asperger's disorder, holding that the parents should have known of the basis for their complaint by the time they decided to place the student at Windward, on the date of the May 2007 CSE meeting (IHO Ex. VII at p. 6).

### **Impartial Hearing and Decision**

An impartial hearing was convened on November 4, 2009 and continued for 14 months, concluding on January 4, 2011 after a 30-day impartial hearing, resulting in over 6000 pages of transcript, 12 witnesses, 52 parent exhibits, 86 district exhibits, and 18 impartial hearing officer

exhibits relating to the extensive motion practice engaged in by the parties.<sup>4</sup> In a well-written, comprehensive decision rendered May 4, 2011, the impartial hearing officer (1) found that sanctions for spoliation, even if permissible, were not appropriate, as the parents failed to establish either bad faith on the part of the district or the relevance of the sought discovery (IHO Decision at pp. 58-64); (2) held that the parents' claims regarding a physical examination report which allegedly should have alerted the district to the student's diagnosis of a pervasive developmental disorder (PDD) were not raised in their due process complaint notice (*id.* at pp. 64-66); (3) reaffirmed her holding that the parents' claims for the 2007-08 school year were time-barred for the reasons stated in her interim decision and, furthermore, for their failure to amend their due process complaint notice to include spoliation as a basis for tolling the limitations period (*id.* at pp. 66-68); (4) determined that the June 2008 IEP was procedurally adequate, as (a) the June 2008 CSE was properly constituted (*id.* at pp. 68-69), (b) the June 2008 IEP was not predetermined and the parents and Windward staff were able to participate in the formulation of the IEP (*id.* at pp. 69-71), (c) the IEP was based on sufficiently recent assessments of the student (*id.* at p. 71), and (d) the IEP was not required to specify the methodology to be used in its implementation (*id.* at pp. 71-72); (5) determined that the IEP nevertheless failed to offer the student a FAPE because a mainstream classroom could not adequately meet the student's behavioral needs even with a 1:1 aide, the IEP required too many transitions, and the assignment of a 1:1 aide to the student would necessarily have led to his isolation from his peers (*id.* at pp. 72-76); (6) found that despite the lack of literature or evaluation reports from Windward, and its failure to offer psychological counseling, the student's academic progress demonstrated that it was an appropriate placement for a portion of the 2008-09 school year; however, the student's escalating behavioral difficulties made Windward inappropriate at least by February 2009 (*id.* at pp. 76-79); (7) ruled that the April 2009 IEP was inappropriate to meet the student's needs, in part because of the parents' obfuscation; nonetheless, even considering only that information available to the April 2009 CSE, the 2009 IEP failed to adequately address the student's behavioral and attending needs and could not have been implemented in a general education classroom (*id.* at pp. 79-83); (8) Eagle Hill was an appropriate placement for the 2009-10 school year, as the student was provided with multisensory instruction in a small class setting, which integrated a behavioral component and directly addressed the student's atypical social behaviors (*id.* at pp. 83-84); (9) the parents were not entitled to reimbursement for their private evaluations, as they disagreed only non-specifically with district evaluations (*id.* at pp. 84-85); and (10) equitable considerations required a diminution in reimbursement for the parents' tuition expenditures, despite the district not being prejudiced by the parents' failure to provide proper notice of their unilateral placement, because the parents (a) made arrangements for the student to attend Windward and Eagle Hill without notifying the district, (b) did not inform the district that they were obtaining private evaluations or share the information received with the district on a timely basis, (c) failed to consent to requested evaluations and observations, and (d) did not attend a requested CSE meeting to discuss the private evaluation reports provided to the district after the April 2009 CSE meeting (*id.* at pp. 85-89). For relief, the

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<sup>4</sup> I note that State regulations contain provisions stating that "[e]ach party shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision" (8 NYCRR 200.5[j][3][xiii]). In this case, there were many instances where the impartial hearing officer allowed far more time than was reasonably necessary for the examination of witnesses, including extensive redirect, recross, and reredirect examination. Unsurprisingly in the 6000-page plus transcript, there are occasions on which witnesses gave cumulative testimony. I remind the impartial hearing officer that she has the power to limit examination of witnesses whose testimony she determines to be irrelevant, immaterial, or unduly repetitious (8 NYCRR 200.5[j][3][xii][d]). The 30-day hearing in this case runs counter to the very purpose of the administrative due process provisions, which were designed to provide parties with a less formal, expeditious forum in which to resolve their claims.

impartial hearing officer granted the parents reimbursement in the amount of \$12,500 for the 2008-09 school year and \$6,500 for the 2009-10 school year, but denied all other requested relief (*id.* at p. 89).

### **Appeals for State-Level Review**

The parents appeal, asserting that the impartial hearing officer (1) erred in failing to impose sanctions on the district for its spoliation of e-mails; (2) improperly determined that the physical examination report was not raised in their due process complaint notice; (3) should have found the limitations period for the 2007-08 school year to be "tolled" based on the district's spoliation of e-mails and conduct in withholding the student's needs from the CSE; (4) erred in finding that the June 2008 CSE was properly composed and that the goals in the June 2008 IEP were not predetermined; (5) mistakenly held Windward to be inappropriate for a portion of the 2008-09 school year and denied the parents full reimbursement for the student's tuition for that year; (6) improperly denied the parents full reimbursement for the student's tuition for the 2009-10 school year at Eagle Hill, as the school was appropriate and the parents gave sufficient notice of their intention to place the student there; and (7) granted the parents less than their requested relief without a rationale, as the parents worked cooperatively with the district at all times and the district attempted to hide information from the parents. The parents also assert that the impartial hearing officer incorrectly stated that the parents raised an issue of fraud<sup>5</sup> and made improper credibility determinations. As relief, the parents request full reimbursement for the 2007-08, 2008-09, and 2009-10 school years, a finding that the district spoliated e-mails regarding the student, and leave to apply for attorneys' fees.<sup>6</sup>

The district answers and generally denies the parents' assertions. In addition, the district interposes two affirmative defenses: (1) that the parents have raised on appeal issues that were not contained in the due process complaint notice, specifically the physical examination report and allegation that the regular education teacher left the 2008 CSE meeting; and (2) that the parents' claims as they relate to the 2007-08 school year are barred by the statute of limitations.

As noted above, rather than cross-appeal, the district separately appeals the impartial hearing officer's determination, asserting that (1) the June 2008 IEP was appropriate, based on the

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<sup>5</sup> The parents claim on appeal that they raised no issue of fraud (Parents' Pet. at ¶¶ 56-59). However, a review of the hearing record establishes that counsel for the parents unmistakably accused the district of fraudulent behavior on several occasions, and declined to withdraw the accusations despite being alerted to the lack of proof supporting the claim and given the chance to do so on multiple occasions (Tr. pp. 1869-70, 2102-03, 3008-09, 3381-82, 4161-62).

<sup>6</sup> The parents contend in their memorandum of law that the impartial hearing officer was biased. In addition to the fact that this claim is not properly raised insofar as a memorandum of law may not be used as a substitute for a pleading (8 NYCRR 279.4, 279.6; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student Suspected of Having a Disability, Appeal No. 08-100), the hearing record reflects that the impartial hearing officer was courteous and patient with counsel for the parents throughout the impartial hearing (*see, e.g.*, Tr. pp. 415-22, 430-37, 441-45, 911, 918-920, 1025-26, 1399, 1740, 2094-2104, 2284-87, 2316-17, 2494-95, 2744, 2751-52, 4088-90, 4114-15, 4222, 4227-28, 4555-61, 4798-4802, 4929-30, 5226-27, 5361-62, 5365-66, 5654, 5813-15, 5893-96, 5938-40, 5953-54, 5975-77; January 31, 2011 Conference at pp. 16, 19, 26; February 2, 2011 Conference at p. 2). In any event, the parents' challenges to the impartial hearing officer's impartiality consist solely of disagreement with her credibility findings and the conclusions she reached, which does not provide a basis for a finding that the impartial hearing officer acted with bias (Application of a Student with a Disability, Appeal No. 10-018; Application of a Student Suspected of Having a Disability, Appeal No. 08-100). The accusations of bias are entirely without merit.

information known to the June 2008 CSE and the minimization of the student's behavioral and emotional needs at the CSE meeting by the parents and Windward staff; (2) Windward was not appropriate for the student for the 2008-09 school year, as the student did not receive the necessary related services and his behaviors worsened over the course of the year; (3) the April 2009 IEP was appropriate and any deficiencies were due to the parents' withholding of information from the district; (4) Eagle Hill was not appropriate for the student as it failed to provide him with the necessary related services; (5) there was insufficient information regarding the programs at either Windward or Eagle Hill for the impartial hearing officer to determine that the schools were appropriate, as no one from either school testified and there was insufficient information regarding how the schools tailored their programs to meet the student's needs; and (6) equitable considerations did not support an award of any reimbursement, because (a) reimbursement was not appropriate for the 2008-09 school year, as there is no authority to support a grant of tuition reimbursement when the private placement was only appropriate for a portion of the year, and (b) reimbursement was not appropriate for the 2009-10 school year since (i) the parents withheld information from the April 2009 CSE, including that they had determined to send the student to Eagle Hill prior to the 2009 CSE meeting and were having the student privately evaluated, and (ii) the parents did not respond to the district's attempt to reconvene the CSE in response to its receipt of the private evaluation reports.

The parents answer and generally deny the district's assertions. Specifically, they contend that the district's programs failed to specify a multisensory methodology, and address the student's difficulties with transitions and socialization; the private placements were found to be appropriate by the parents' private evaluators; and the parents cooperated with the district.

## **Discussion**

### **Preliminary Matters—Unappealed Determinations/Scope of Impartial Hearing**

Initially, State regulations provide that a party who fails to obtain a favorable ruling with respect to an issue submitted to an impartial hearing officer is bound by that ruling unless the party either asserts an appeal or interposes a cross-appeal (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Neither party has challenged the impartial hearing officer's determinations that (1) the due process complaint notice was filed after the limitations period for the 2007-08 school year, absent tolling or an exception to the period (IHO Decision at p. 67); (2) the 2008 IEP provided for appropriate instructional methodologies and academic goals (id. at p. 75); and (3) the 2009 IEP contained appropriate goals and program modifications, based on the information before the CSE (id. at p. 83). Accordingly, these issues have become binding on the parties.

The parents argue on appeal that the impartial hearing officer improperly declined to address their claims related to the student's March 2006 diagnosis of PDD as referenced in the physical examination report (Dist. Ex. 18 at p. 1). Upon review of the hearing record, the alleged failure of the district to address the student's needs as they relate to a purported diagnosis of PDD is not reasonably referenced in the parents' 25-page due process complaint notice as a part of the nature of the problem so as to reasonably put the district on notice that it would be expected to defend against this singular notation and any and all claims related thereto, and I find that the impartial hearing officer properly refused to consider the contents of the physical examination

report (see IHO Decision at p. 65; IHO Ex. I; see also W.M. v. Lakeland Cent. Sch. Dist., 2011 WL 1044269, \*8 [S.D.N.Y. Mar. 10, 2011]).<sup>7</sup>

### **The 2007-08 School Year and the Statute of Limitations**

Turning to those aspects of the impartial hearing officer's decision regarding the 2007-08 claims, the parents contend that the impartial hearing officer erred in granting the district's motion to dismiss their claims relating to the 2007-08 school year as time-barred. Under the IDEA, a claim accrues when the petitioner "knew or should have known about the alleged action that forms the basis of the complaint" (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 C.F.R. § 300.511[e]; 8 NYCRR 200.5[j][1][i]). The mother testified that she began considering sending the student to Windward as early as November or December 2006, and that she informed the district that the student would be attending Windward at the May 2007 CSE meeting (Tr. pp. 3453-56, 3471-72). The director testified that she learned that the student would be attending Windward sometime between the May 2007 CSE meeting and the date that the IEP was finalized (Tr. p. 636; see Dist. Ex. 1 at pp. 1, 9).<sup>8</sup> Accordingly, the parents were aware that they did not consider the May 2007 IEP to offer the student a FAPE, and their claim accrued, no later than the end of June 2007.<sup>9</sup> The due process complaint notice was served on the district on August 4, 2009 (IHO Ex. III at Appx. B), more than two years after their claims for the 2007-08 school year accrued. The parents argue that the limitations period should have been "tolled" because the district's spoliation of relevant evidence met the exceptions to the limitations period contained in the IDEA and implementing regulations. As any alleged spoliation did not affect the provision of a FAPE to the student, and for the reasons stated below, I find, as more fully described below, that the exception to the limitations period for the parents' 2007-08 school year claims does not apply.

### **Exceptions to the Limitations Period**

A due process complaint notice must be filed within two years of the accrual of the complaint unless the parent, as the complaining party, "was prevented from requesting the impartial hearing due to specific misrepresentations by the school district that it had resolved the problem forming the basis of the complaint or the school district's withholding of information from the parent that was required to be provided to the parent under" 8 NYCRR parts 200 or 201 (8

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<sup>7</sup> Even if the parents' concern regarding PDD had been identified in the due process complaint notice, I further note that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs," accordingly, "as with any other purported procedural defect, the party challenging the IEP must show that the failure to include a proper disability diagnosis compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits" (Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [internal quotation marks omitted]; see Application of a Student with a Disability, Appeal No. 09-126 ["a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]).

<sup>8</sup> The 2007 IEP, mailed to the parents on June 22, 2007, indicates that the student had been parentally placed at Windward.

<sup>9</sup> The impartial hearing officer did not explicitly state when the claim for the 2007-08 school year accrued, but held that the due process complaint notice was received by the district "nearly three months after [the parents'] statutory window of opportunity" to file the notice (IHO Decision at p. 67). It may be inferred that she found the claim to accrue in early May 2007.



NYCRR 200.5[j][1][i]; see also 20 U.S.C. § 1415[f][3][D]; Educ. Law § 4404[1][a]; 34 C.F.R. § 300.511[f]). The parents do not assert that the district represented "that it had resolved the problem forming the basis of the complaint," nor do they identify the information which the district withheld from them that was required to be provided to them pursuant to the regulations implementing the IDEA.<sup>10</sup> Essentially, the parents' argument distills to a claim that, after the student's mother informed the district school psychologist that the student had received a diagnosis of PDD, the school psychologist encouraged the student's mother to ignore the diagnosis and kept that information from the other district members of the CSE.<sup>11</sup> However, even if accepted as true, these facts in no way indicate that the parents were prevented from requesting an impartial hearing, as the mother testified that the parents did not consider the 2007 IEP to provide the student with an appropriate education, regardless of their contentions that they learned of additional reasons thereafter (Tr. pp. 3471-72). In any event, the possibility of the student being offered different services if the CSE had been made aware of the alleged PDD diagnosis at the May 2007 CSE meeting has no bearing on the services that were actually offered, and to which the parents took exception. The testimony adduced at the impartial hearing establishes that not only district staff, but the parents' private evaluators, considered the student's most pressing deficits at the time of the 2007 CSE meeting to be his speech-language impairment and behaviors related to an attention deficit hyperactivity disorder (ADHD) (Tr. pp. 327-331 [the director], 1485-86, 1552-53, 1583-87, 1602-04 [school psychologist], 2136-37, 2184-86, 2189-90, 2267-68, 2279-82, 2306-08 [district speech-language pathologist], 2626-27, 2709-16, 2763 [district special education teacher], 3901, 3908-09, 3911-13, 3945-48, 4050-51, 4054 [private speech-language pathologist]; see Tr. pp. 4358-59 [private neuropsychologist]). Finally, the parents' claim that the district withheld information from the CSE, rather than the parents, is not encompassed by the exceptions to the limitations period and provides no basis for finding the parents' claims for the 2007-08 school year to be timely. As noted above, the student's mother testified that she was aware of the student's PDD diagnosis by April 2006 and discussed it with the school psychologist (Tr. pp. 3406, 3408-10, 3648, 4843-44). As the parents were aware of the information which they claim the district withheld from the CSE, I find that the exceptions to the limitations period do not apply here.

### **Claim of Spoliation**

The parents also argue that the limitations period should have been tolled because the district spoliated e-mails regarding the student, in contravention of State regulations governing the retention of a student's educational record (see 8 NYCRR 185.12, Appendix I [Schedule ED-1] at pp. 100-01[1.(267)(b)] [districts are obliged to retain special education records, including "parent communication" and "agency communication," for a period of six years]; see also id. at p. xiii [e-mail records are to be treated the same as records in other formats]). They further assert that the

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<sup>10</sup> The parents also did not raise either of these grounds when opposing the district's motion to dismiss their claims for the 2007-08 school year (see IHO Ex. VII at p. 4 [interim decision on the motion to dismiss]); rather, they argued that their claims were not time-barred because the district waived the limitations defense by not interposing it as a defense in its answer to the due process complaint notice, and the parents did not know of the basis for the complaint until the student was evaluated in April 2009 and diagnosed with Asperger's disorder (IHO Ex. IV at pp. 5-8). Neither of these grounds has been asserted on appeal.

<sup>11</sup> I also note that, although the parents challenge at length the district's failure to respond to the student's supposed PDD diagnosis, they have raised no challenge to the student's classification as a student with a speech or language impairment, either with their papers submitted to this office or during the impartial hearing.

district was under an obligation to issue a litigation hold by the date of their first request for document inspection.

The impartial hearing officer found that Schedule ED-1 (pp. 100-01[1.(267)(b)]) in State regulations governed the retention of the e-mails sought by the parents (IHO Decision at p. 60).<sup>12</sup> However, she also found that because the district deleted e-mails on a system-wide basis, any noncompliance with Schedule ED-1 was insufficient to establish the sort of egregious conduct or intentional malfeasance required for a per se finding of spoliation (IHO Decision at p. 61). Furthermore, the impartial hearing officer held that the parents had failed to show the relevance of the sought after e-mails so as to hold the district liable for its negligent deletion of the e-mails (IHO Decision at pp. 61-64). The impartial hearing officer also appeared to question whether the spoliation issue was applicable and could be resolved in the context of an administrative due process hearing pursuant to the IDEA and State Regulations (IHO Decision at p. 64).

Initially, I note that in New York State, the formal rules of evidence that are applicable in civil proceedings generally do not apply in impartial hearings (see Cowan v. Mills, 34 A.D.3d 1166, 1167 [3d Dep't 2006]; Tonette E. v. New York State Office of Children and Family Servs., 25 A.D.3d 994, 995-96 [3d Dep't 2006] [strict formal rules of evidence need not be observed at administrative hearings]; Matos v. Hove, 940 F. Supp. 67, 72 [S.D.N.Y. Sept. 25, 1996], citing Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 [7th Cir. 1977] [Federal Rules of Civil Procedure do not apply to administrative proceedings]; Application of the Bd. of Educ., Appeal No. 10-014; Application of the Bd. of Educ., Appeal No. 05-007; Application of a Child with a Disability, Appeal No. 99-5; Application of a Child with a Disability, Appeal No. 96-45); however, nothing precludes an impartial hearing officer from considering a motion by either party under appropriate circumstances (Application of the Bd. of Educ., Appeal No. 11-004; Application of the Bd. of Educ., Appeal No. 10-129; Application of a Child with a Disability, Appeal No. 96-45; see Application of the Bd. of Educ., Appeal No. 05-007 [motion for a directed verdict]; Application of a Child with a Disability, Appeal No. 04-061 [motion to identify the issues]; Application of a Child with a Disability, Appeal No. 04-046 [motion for recusal]; Application of a Child with a Disability, Appeal No. 04-018 [recognizing motion for summary judgment could be used in IDEA proceedings in certain circumstances if there is a lack of any genuine issue of material fact and both sides have had an opportunity to present evidence]). Furthermore, it was the impartial hearing officer's obligation to exclude evidence she found to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see 34 C.F.R. § 300.181[o]).

I note that the vast majority of the case law on the subject of spoliation is based on the violation of discovery provisions contained in the Federal Rules of Civil Procedure (Fed. R. Civ. Proc. 37) or the CPLR (CPLR 3126) and the inherent power of the State and federal courts to regulate litigation and protect the integrity of the proceedings before them (see Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 [S.D.N.Y. 2003] ["Zubulake IV"]). Accordingly, the

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<sup>12</sup> Furthermore, although in their moving papers the district contended that the parents cited to the incorrect portion of Schedule ED-1, and that the district was permitted to delete transitory e-mails (IHO Ex. IX at pp. 3-4; see Schedule ED-1 at pp. xiii, 6[18.(18)]), they did not appeal from that portion of the impartial hearing officer's decision which found that the special education records provisions, rather than the general provision applicable to transitory messages, applied to the requested e-mails, nor do they allege such in their answer to the parents' appeal. Accordingly, I assume without deciding for the purposes of this appeal that the requested e-mails were special education records and thus subject to the more restrictive provisions regarding retention.

applicability of the cases cited by the parties to IDEA administrative proceedings is dubious, and I have serious reservations regarding whether there is a private right of action with regard to alleged violations of the Schedule ED-1 in this case and, assuming without deciding that there is a private right of action, whether an administrative hearing officer has the authority to hear such a claim or impose sanctions under the IDEA for spoliation of district records in general.<sup>13</sup> The jurisdiction of an administrative hearing officer under the IDEA centers on matters relating to the identification, evaluation or educational placement of students, or the provision of a FAPE (20 U.S.C. § 1415[b][6][A]; 34 C.F.R. § 300.507[a][1]; 8 NYCRR 200.5[i][1]; [j][1]), and hearing officers are provided with the authority to order evaluations and issue subpoenas if necessary to ensure the development of an appropriate hearing record upon which to resolve claims over appropriate special education services for students with disabilities.

Even assuming for the sake of argument that spoliation disputes and the imposition of sanctions are the proper subject of a due process proceeding—a doubtful premise—in this case the school psychologist testified that, as a matter of practice, she printed out all e-mail correspondence and put it in her file (Tr. pp. 1866, 1884-85, 1902). The school psychologist admitted, however, that she could not recall if there were additional e-mails regarding the student in her files regarding the student's sibling (Tr. pp. 1885-86, 1888, 1890). The district's director of technology averred that, prior to August 2009, the district had a practice of retaining e-mails for 180 days, after which they were deleted (Parent Ex. TT at pp. 1-2). She testified that the district began archiving e-mails for a period of seven years in summer or fall 2009 (Tr. pp. 5618-19, 5624-25). Prior to that time, e-mails had been automatically deleted after 180 days, such that e-mails prior to January 2009 were no longer retrievable (Tr. pp. 5621, 5625-26, 5669-70). Generally, "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents" (Zubulake IV, 220 F.R.D. at 218). I agree with the impartial hearing officer and hold that the district's practice here "does not reflect the kind of egregious conduct" or bad faith necessary for a finding that the e-mails at issue were destroyed with a culpable state of mind (IHO Decision at p. 61), such that, if pending litigation were the only basis for finding that the district had an obligation to preserve the e-mails, the parents' claim must fail.<sup>14</sup> I also agree with the impartial hearing officer that, given the system-wide deletion of e-mails from the district's servers, not only would it be unwarranted to find that the district deleted e-mails in bad faith, but also to find that the district knowingly deleted any e-

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<sup>13</sup> I am especially wary of applying spoliation standards developed in the context of multimillion-dollar, multi-year litigation between national corporations with extensive resources (see, e.g., Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Sec., 685 F. Supp. 2d 456 [S.D.N.Y. 2010]; In re A&M Florida Props. II v. Am. Fed. Title Corp., 2010 WL 1418861 [Bankr. S.D.N.Y. Apr. 7, 2010]; see also Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 [S.D.N.Y. 2004] ["Zubulake V"]; Zubulake IV, 220 F.R.D. 212) to administrative proceedings under the IDEA, the regulations for which contemplate two days of hearing (8 NYCRR 200.5[j][3][xiii]), contain no express discovery provisions, and generally require a decision to be rendered within a 45-day timeline (8 NYCRR 200.5[j][5]).

<sup>14</sup> In any event, the parents served their due process complaint notice on the district on August 4, 2009 (IHO Ex. III at Appx. C) and that the district's director of technology testified that e-mails were retained by the district dating back to January 3, 2009 (Tr. pp. 5669-70). Accordingly, even if the failure to implement a litigation hold constituted gross negligence, no documents were destroyed subsequent to the time that the impartial hearing request was delivered to the district. While the parents argue that the district should have been on notice of the potential for litigation as early as March 2008, when counsel for the parents first requested to review the student's educational record, I note that the parents never gave the district notice of their intent to seek reimbursement for the student's placements at Windward or Eagle Hill (Tr. pp. 154-55, 187, 294-97, 661), so that litigation could not be said to be reasonably foreseeable.

mails relating to the student (IHO Decision at pp. 60-61). Additionally I agree with the impartial hearing officer that it is left entirely unclear how further questioning of the district's employees, even if they were to be shown to be conspiring to deprive the student of a FAPE, would weigh in any way upon the IEPs and the programs the CSE actually offered to the student (IHO Decision at pp. 62-63). This is not a case where the e-mails contain the only relevant information for the parents' claims that their child was denied a FAPE (cf. Kronisch v. United States, 150 F.3d 112, 128-29 [2d Cir. 1998]).

For these reasons, the hearing record does not support the conclusion that the exceptions to the limitations period should apply to the parents' claims with respect to the 2007-08 school year and, as they do not challenge the impartial hearing officer's determination that their due process complaint notice was otherwise untimely as it related to the 2007-08 school year, I find that the impartial hearing officer properly dismissed the parents' claims for the 2007-08 school year.

### **Applicable Standards**

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an

"appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **District's Proposed Programs—2008-2009 and 2009-2010**

### **The June 2008 CSE Meeting and IEP**

On June 19, 2008 the CSE convened for the student's annual review and to develop his IEP for the 2008-09 school year (Dist. Ex. 2). Attendees included the director of pupil personnel services and special education (director), who acted as the CSE chairperson; the district school psychologist who had conducted an observation of the student's Windward classroom on June 9, 2008; a district special education teacher; a district regular education teacher; a district occupational therapist; a district speech-language pathologist; the parents; counsel for the district; and counsel for the parents (Dist. Exs. 2 at p. 5; 22). Both Windward's CSE liaison/grades 1 and 2 team leader, and the assistant head of the lower school, who was also the student's science teacher, participated in the meeting by telephone (Dist. Ex. 2 at p. 5; Parent Ex. E-1 at pp. 3, 10).

### **June 2008 CSE Meeting**

On appeal, the parents assert that the June 2008 CSE was improperly constituted due to the district regular education teacher's lack of participation and early departure from the meeting. The student's mother and father testified that the regular education teacher left the meeting prior to its conclusion, in contrast to the testimony of the director, the school psychologist, and the district special education teacher, who all attended the meeting and stated their belief that the district regular education teacher did not leave prematurely (compare Tr. pp. 1640-43, 2776-77, 5933-35, with Tr. pp. 3490-91, 5511-12; Dist. Ex. 2 at p. 2). A transcript of the June 2008 CSE meeting, submitted by the parents, reflected that the regular education teacher participated during the meeting in a discussion of the student's goals, and toward the end of the meeting when she asked if she was still needed, the director and the district's attorney stated that she was (Parent Ex. E-1 at pp. 3, 5, 8, 15, 19, 21-28, 45). The transcript does not reflect that the regular education teacher left prior to the conclusion of the June 2008 CSE meeting (Parent Ex. E-1 at pp. 1-55). I am not persuaded that both parents and their counsel would have let pass unmentioned the regular education teacher leaving prior to the conclusion of the meeting after objecting to releasing her from attendance and, even if I were to find that the regular education teacher did not attend the entirety of the June 2008 CSE meeting, the hearing record nevertheless supports the impartial hearing officer's determination on this issue, and does not reflect that such a procedural inadequacy as partial attendance (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The parents further allege on appeal that the district teachers who attended the June 2008 CSE meeting did not have current knowledge of the student, and that the Windward personnel who participated in the June 2008 CSE meeting were "not members of the CSE." The hearing record reflects that the student attended Windward during the 2007-08 school year, and the Windward CSE liaison, as well as the student's Windward science teacher, actively participated during the June 2008 CSE meeting by providing specific, current information regarding the students needs and skills (see Parent Ex. E-1). I note that the district special education teacher who participated

in the June 2008 CSE meeting had observed the student at his preschool program, conducted an educational assessment of the student in fall 2006, and attended his CPSE, section 504 and CSE meetings from the 2005-06 school year through the 2007-08 school year (Tr. pp. 2459-60; Dist. Exs. 5-8; 13). Additionally, the school psychologist who participated in the June 2008 CSE meeting had conducted a classroom observation of the student at Windward on June 9, 2008, and prepared an observation report that was reviewed by the June 2008 CSE (Tr. p. 175; Dist. Ex. 22; Parent Ex. E-1 at pp. 16-17). The hearing record supports the impartial hearing officer's finding that the district, in formulating the student's June 19, 2008 IEP, "reasonably relied upon the contributions of Windward and the [p]arents" (IHO Decision at p. 69), and does not show that these alleged procedural violations rose to the level of a denial of a FAPE.

Finally, the parents allege that the June 2008 CSE meeting was improperly conducted because the district "had already made a decision regarding [the student's] goals for the 2008-09 school year without the parents' participation prior to the time of the June 19, 2008 CSE meeting." Under the IDEA, it is not impermissible for school district personnel to prepare draft goals prior to a CSE meeting (R.R. v. Scarsdale Union Free Sch. Dist., 615 F.Supp.2d 283, 294 [S.D.N.Y. May 15, 2009]; A.C. v. Board of Educ. of the Chappaqua Central Sch. Dist., 2007 WL 1259145, at \*4 [S.D.N.Y. Apr. 27, 2007]; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Child with a Disability, Appeal No. 06-111; Application of a Child with a Disability, Appeal No. 06-106; Application of a Child with a Disability, Appeal No. 05-087; Application of a Child with a Disability, Appeal No. 02-029; Application of a Child with a Disability, Appeal No. 01-073; see Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; W.S. ex rel. C.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006] [a school district should not be precluded from suggesting an outcome at a CSE meeting]; Application of a Child with a Disability, Appeal No. 07-030; see also L.K. v. Department of Educ. of the City of New York, 2011 WL 127063, at \* 2 [E.D.N.Y. Jan. 13, 2011]). In this case, the parents' argument is squarely contradicted by the evidence. The hearing record is replete with evidence that, while the district proposed goals at the June 2008 CSE meeting, the participants from Windward were given the opportunity to comment and, when they felt the goals to be insufficient to meet the student's needs, the district deferred to their greater knowledge of the student's present levels of performance. The hearing record demonstrates that, while the CSE had prepared draft annual goals for the student prior to the June 2008 CSE meeting, it also reflects that Windward personnel actively participated in discussing and modifying those proposed annual goals during the CSE meeting, based upon their knowledge of the student gained during the 2007-08 school year (Parent Ex. E-1 at pp. 18-36, 40, 46-47). Both the director and school psychologist testified regarding the importance of Windward personnel contributions to the development of the student's annual goals, due to their understanding of his recent performance in school (Tr. pp. 181-84, 689, 1162-65; see Tr. pp. 845-51). The transcript of the June 2008 CSE meeting does not reflect that the student's mother was precluded in any way from participating in the discussion and development of her son's annual goals (see Parent Ex. E-1), and the hearing record as a whole does not support the parents' allegation that the June 2008 CSE predetermined the student's annual goals or that they were denied the opportunity to provide input as a result of the district's preparations for the CSE meeting.

### **Evaluative Information Before the June 2008 CSE**

Turning to the arguments regarding the June 2008 IEP resulting from the CSE meeting, I note that the information available to the district prior to the June 2008 CSE meeting indicated that the student's nonverbal, visual-perceptual reasoning abilities fell in the superior range, and that he

exhibited strong abstract reasoning and problem solving skills (Dist. Ex. 14 at p. 9). His verbal comprehension and reasoning abilities were in the average range of cognitive functioning, resulting in a significant relative weakness in language-based reasoning/processing ability as compared to his visual-perceptual reasoning/processing ability (Dist. Ex. 14 at p. 4). The student was found to meet the criteria for a diagnosis of a mixed expressive-receptive language disorder, characterized by difficulty with expressive language organization, recall and retention of linguistic information, word retrieval, and language structure, which interfered with his ability to clearly express his ideas (Dist. Exs. 10 at p. 5; 11 at p. 6). The student also exhibited difficulty with pragmatic language skills such as turn-taking, topic maintenance, interpersonal eye contact, and reciprocal language skills (Dist. Ex. 10 at p. 5). At times, the student misread social cues, lacked awareness of personal space, and spoke too loudly to others (Dist. Ex. 12 at pp. 1-2). He had received a diagnosis of an ADHD, characterized by difficulty attending to auditory information without visual supports, impulsivity, inattentiveness, and hyperactive behaviors (Dist. Ex. 14 at p. 6; see Dist. Ex. 12 at pp. 3-4). The student benefited from classroom structure, routines, redirection, and support to manage transitions and follow directions (Dist. Exs. 12 at p. 4; 14 at p. 6). He exhibited weak fine motor and visual motor integration skills, in conjunction with occasional hand tremors (Dist. Exs. 9 at p. 4; 14 at p. 8; 15 at p. 2; 19). The student also demonstrated sensory motor/processing weaknesses, and benefitted from vestibular, proprioceptive, and tactile input to help him self-regulate (Dist. Exs. 15 at p. 2; 19). Academic achievement assessments conducted in June 2006 and during fall of the 2006-07 school year revealed variable mathematics skills, average to the lower end of average reading skills, and a learning disability in the area of written expression (Dist. Exs. 13; 14 at p. 5-6). Private evaluators retained by the parents and the student's kindergarten teacher recommended that due to his language, academic and behavioral needs, the student receive the support of an aide to help him understand directions, stay focused, complete tasks, and reinforce academic concepts (Dist. Exs. 11 at p. 6; 14 at p. 10; see Dist. Ex. 1 at pp. 1, 5). Evaluation reports also recommended the continuation of the student's speech-language and occupational therapy services (Dist. Exs. 10 at p. 5; 11 at p. 6; 14 at p. 10; 15 at p. 2; 19).

Information about the student obtained during the 2007-08 school year from Windward personnel and reviewed at the June 2008 CSE meeting included the results of administrations of the Stanford 10 Reading and Stanford 10 Math assessments, and his 2007-08 Windward progress reports (Dist. Exs. 20; 21; Parent Ex. E-1 at pp. 4-16). Additionally, the school psychologist reviewed her report of a June 9, 2008 classroom observation of the student conducted at Windward (Dist. Ex. 22; Parent Ex. E-1 at pp. 16-17). On a May 19, 2008 administration of the Stanford 10 Reading assessment, the student achieved a timed vocabulary subtest score in the 27th percentile, and a timed comprehension subtest score in the 42nd percentile (Dist. Ex. 20 at p. 2). On a May 28, 2008 administration of the Stanford 10 Math assessment, the student achieved a timed procedures subtest score in the 78th percentile, and a timed problem solving subtest score in the 87th percentile; with a total math score in the 85th percentile (Dist. Ex. 20 at p. 2). The CSE reviewed the student's performance on a May 19, 2008 administration of the Windward Coding Test: Reading, which was described as a nonstandardized test of single word reading (Dist. Ex. 20 at p. 2; Parent Ex. E-1 at p. 14). According to the Windward CSE liaison, the student read 85 percent of the words correctly on the test (Parent Ex. E-1 at p. 14). On May 8, 2008, the student was administered the Windward Coding Test: Spelling, described as a spelling test of consonant-vowel-consonant (CVC) words that the student had been exposed to during his year at Windward (Dist. Ex. 20 at p. 3; Parent Ex. E-1 at p. 15). The CSE liaison reported that the student exhibited the ability to spell 90 percent of the CVC words presented (Dist. Ex. 20 at p. 3; Parent Ex. E-1 at p. 15).



The student's 2007-08 Windward progress report was prepared using a rubric numbered 1 through 4 (1-Always; 2-Usually; 3-Occasionally; 4-Rarely), including "Not Applicable" (N/A) and "Not yet introduced" (NYI) designations (Dist. Ex. 21). In June 2008 the student received designations of "1" or "2" in the majority of areas measuring the demonstration of positive work habits, time management skills, effort and behavior in all of his academic classes (Dist. Ex. 21 at pp. 2-3, 8, 11, 12). At the June 19, 2008 CSE meeting, the Windward CSE liaison provided a detailed account of the student's Windward language arts program, which encompassed reading/spelling, reading comprehension, and written expression, and his then-current skill level in those areas (Dist. Ex. 21 at pp. 4-7; Parent Ex. E-1 at pp. 4-7). Specifically, she indicated that the student received instruction using the Preventing Academic Failure (PAF) program, which she described as an Orton-Gillingham approach incorporating multisensory techniques such as visual charts, sky writing, and verbal repetition (Parent Ex. E-1 at p. 6). June 2008 comments prepared by the student's Windward language arts teacher indicated that the student "continued to make steady progress in language arts classes," indicating that he "use[d] all the strategies taught to assist him to spell and decode" (Dist. Ex. 21 at p. 7). The progress report noted that the student had "become a more fluent reader," that he usually read with expression, that he "clearly enjoy[ed] reading aloud, and ha[d] become an active participant in [the] class discussions" (Dist. Ex. 21 at p. 7). The student was able to compose simple original sentences although he "continue[d] to need teacher support to help him expand his ideas" (Dist. Ex. 21 at p. 7). The language arts teacher indicated that the student "worked hard" during the year, and that "he should be proud of his accomplishments" (Dist. Ex. 21 at p. 7).

In mathematics, the student's progress report reflected designations of "1" (successfully applies skills to independent work) or "2" (completes structured activities successfully) in the vast majority of areas measuring the student's numbers and operations; money, time, data and graphing; and problem solving skills (Dist. Ex. 21 at pp. 9-10; see Parent Ex. E-1 at pp. 7-8). The student's Windward mathematics teacher reported that the student "continued to make good progress in math," and although he "learned many strategies to help him solve addition and subtraction problems," the student preferred to use his fingers (Dist. Ex. 21 at p. 10). The progress report also indicated that the student had "worked very hard and [was] motivated to do well," and that the mathematics teacher enjoyed having the student in class (Dist. Ex. 21 at p. 10). The student received "[a]lways" and "[u]sually" designations related to his ability to understand concepts and display skills in science, and he received "[u]sually" and "[o]ccasionally" designations regarding those same abilities in social studies (Dist. Ex. 21 at pp. 11-12). The student's Windward science teacher reported at the June 19, 2008 CSE meeting that the student understood the scientific concepts presented, was able to apply them, and that he was an active participant in class (Parent Ex. E-1 at pp. 10-11).

Regarding the student's participation in classes such as art, music and physical education, the Windward science teacher reported that although the student was someone "we need[ed] to monitor carefully," with teacher support "he certainly [was] successful in all the special activities" (Parent Ex. E-1 at p. 11; see Dist. Ex. 21 at pp. 13-15). She added that at times transitions were difficult for the student, but that Windward personnel had observed "great progress with him throughout the year" (Parent Ex. E-1 at p. 11).<sup>15</sup> At Windward the student received "special monitoring" during lunch provided by two teachers, and at times ate lunch in the science teacher's

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<sup>15</sup> The science teacher also commented that changes in the student's medication "impacted . . . those times" (Parent Ex. E-1 at p. 11).

office; however, on "most days he was able to interact appropriately with the children, work on developing stronger social skills and work on developing social language in both lunch and recess period" (Parent Ex. E-1 at p. 12).

During the June 2008 CSE meeting, the Windward CSE liaison reported that the student "ha[d] friends," was "very social," and was "well liked by the children and the teachers" (Parent Ex. E-1 at p. 8). She described how "at times" the student could become "set on something" in that he "wanted to do it a certain way," and that he did not want to "change what . . . he [was] doing" (Parent Ex. E-1 at p. 9). These situations could "get [the student] upset," requiring the teacher to pull the student aside and talk with him, which calmed him down (Parent Ex. E-1 at p. 9). According to the CSE liaison, the student was "very rigid with any changes that occur," and may get upset and yell; however, "he d[id] calm down . . . so these [were] quick bursts and when they're over[,] they're over" (Parent Ex. E-1 at p. 9). At times when the student became "annoyed," it took "a little while to calm him down" (Parent Ex. E-1 at p. 9). If the student was unable to "calm down," the CSE liaison stated that the student would meet with his science teacher and talk with her until he was ready to return to class (Parent Ex. E-1 at p. 10). The CSE liaison indicated that although these behaviors occurred throughout the school year approximately three times per day, a recent change in the student's ADHD medication appeared to have been beneficial (Parent Ex. E-1 at pp. 9-10). The student's Windward science teacher reported at the June 2008 CSE meeting that during science class the student "liked to be in charge," and during group activities wanted to control how the group was working (Parent Ex. E-1 at pp. 10-11). She indicated that with "some teacher support and guidance" the student was able to work in a group, but that she "really needed to be around . . . with those kinds of activities" (Parent Ex. E-1 at p. 11). At times, the student lacked "tolerance," although the science teacher indicated that when the student was redirected and refocused "he really trie[d]" (Parent Ex. E-1 at p. 11). She added that with "a little time and a little teacher support he [was] able to bring himself back" (Parent Ex. E-1 at p. 11). The science teacher reported that the student had difficulty keeping his hands to himself while walking in the hallways, "[n]ot that he was hurting anyone else but kind of touching them to secure his personal space" (Parent Ex. E-1 at p. 11). She indicated that the student was working on keeping his hands to his side and remaining in his place in line, and that this behavior had "dramatically improved" through the year (Parent Ex. E-1 at p. 11).

The school psychologist reviewed her classroom observation of the student at Windward, which had occurred 10 days prior to the June 2008 CSE meeting (Dist. Ex. 22; Parent Ex. E-1 at pp. 16-17). She reported that her "lovely" observation of the student lasted approximately one hour, during his morning language arts lesson (Dist. Ex. 22; Parent Ex. E-1 at p. 16). The school psychologist observed that the student "worked very diligently and hard" in class, and that he was able to successfully shut out distractions caused by other students in the room (*id.*). During the observation the student completed reading and writing activities both independently and with teacher prompts (*id.*). On two occasions, the student was observed not following along while his peers read aloud; however, he responded to redirection from the teacher and later was praised for following along with the group (Dist. Ex. 22). When the student read aloud in front of the group, the school psychologist opined that he "appeared comfortable," and that he "read with good fluency and independently blended out the sounds on more difficult words" (Dist. Ex. 22). He also was observed reading with "good expression and enthusiasm" (Dist. Ex. 22; Parent Ex. E-1 at p. 17). During a short break in the lesson, the student was observed "chatt[ing] easily with peers" (Dist. Ex. 22; Parent Ex. E-1 at p. 17).

## **Adequacy of the June 2008 IEP**

A review of the June 2008 IEP present levels of academic achievement, social development, physical development, and management needs reflects the information discussed above (compare Dist. Ex. 2 at pp. 3-5, with Dist. Exs. 10-15; 19-22). Also as indicated above, the Windward CSE liaison participated in the development of the student's proposed annual goals that were discussed at the meeting, and the resultant June 2008 IEP reflected her suggestions (compare Dist. Ex. 2 at pp. 8-11, with Parent Ex. E-1 at pp. 18-36, 40, 46-47). The June 2008 IEP contains annual goals related to the student's identified needs in the areas of reading decoding and fluency, spelling, written expression, mathematics, auditory comprehension, expressive language, pragmatic language and social skills, and fine motor and graphomotor skills (Dist. Ex. 2 at pp. 8-11). I note that the impartial hearing officer determined that the academic annual goals developed by the CSE at the June 2008 CSE meeting were appropriate, and that the parents have not appealed from that determination (IHO Decision at p. 75).

For the 2008-09 school year, the CSE recommended that the student receive a general education program with daily 45-minute sessions of 15:1 resource consultant teacher services in a separate location, and the services of a full-time shared (3:1) aide (Dist. Ex. 2 at p. 1). The director indicated that general education classrooms in the district were generally composed of between 18-22 students, and a "grade level aide" was assigned to monitor lunch and recess (Tr. pp. 269-70). She described the resource consultant teacher services as "a special education teacher who provides instruction to implement the goals that were developed at the IEP meeting, they can also work in the capacity of collaborating with the classroom teachers to make[] sure those goals are reinforced in the classroom" (Tr. p. 907). She further stated that students who receive resource consultant teacher services meet in a group not to exceed a ratio of 15:1, in either a push-in or pull-out model (Tr. p. 907). The hearing record reflects that the June 2008 CSE increased the amount of weekly resource consultant teacher services from what had been previously offered to the student for the 2007-08 school year, based in part upon input from the Windward CSE liaison who agreed that the student should receive daily special education instruction (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at p. 1; see also Parent Ex. E-1 at pp. 47-48). The director testified that resource consultant teacher services were appropriate for the student because that service specifically addressed reading, writing, and mathematics instruction; which were areas of need identified by the June 2008 CSE for which annual goals were developed (Tr. pp. 180-82; Dist. Ex. 2 at pp. 4, 8-10; see Tr. pp. 140-41). At the June 2008 CSE meeting, the director stated that two of the student's weekly resource consultant teacher sessions would focus on mathematics, and three of the sessions would focus on language arts instruction, which would use a multisensory approach to reading to work on improving the student's phonological processing, reading, and writing skills (Parent Ex. E-1 at p. 47-48). Following the director's description of and recommendation for the resource consultant teacher services at the June 2008 CSE meeting, the Windward CSE liaison responded that the resource consultant teacher program "sounds good" (Parent Ex. E-1 at pp. 47-48).

To address the student's need for refocusing and redirection, to help monitor and moderate his classroom behavior, and to support him during transitions, the CSE recommended the services of a shared aide (Tr. pp. 862-63; Dist. Ex. 2 at pp. 1-2). The hearing record reflects that the CSE's recommendations for shared aide services were based in part on the perception that the student had experienced a successful kindergarten school year while receiving the services of an aide (Tr. pp. 141-42, 703-04, 862-63, 1283-84, 5711-13, 5725, 5762; Dist. Exs. 1 at pp. 1, 5; 39; 72; 73). During kindergarten, the aide provided the student with reminders about organization and transitions,

encouragement when he appeared upset or nervous, and support during social interactions with peers (Tr. pp. 1070-71, 1075-76, 5805-10). When asked how the student performed in the general education kindergarten class, the student's kindergarten teacher responded "if I had to say in a word, I'd say great" (Tr. pp. 5710-11; see Dist. Exs. 39; 72; 73). Although the impartial hearing officer expressed concerns that the student would become overly dependent on the aide, the kindergarten teacher testified that, when compared to the beginning of the school year, at the end of kindergarten the student transitioned between centers in the classroom "by himself," and no longer required pre-transition reminders (Tr. pp. 5807-10; IHO Decision at p. 75). The school psychologist testified that she and the kindergarten teacher worked with the aide to allow the student opportunities to be more independent (Tr. pp. 1071, 1570-71, 1947-48). The impartial hearing officer offered additional concerns that the presence of the aide would be socially isolating for the student; however, the director testified that the district's aide program was sensitive to how shadow aides could "support children in a way that engaged other children to be part of the group and not to be stigmatized" by receipt of aide services (Tr. pp. 863-64; IHO Decision at p. 74).

Although the impartial hearing officer found that "an aide cannot be utilized to fill in the gaps where solid programming is unavailable," the hearing record supports a finding that the student was offered appropriately designed program modifications, in addition to the aide services, to meet his special education needs (IHO Decision at p. 74). In combination with the resource consultant teacher services described above to address the student's academic needs, and the shared aide services, the June 2008 CSE recommended that the student receive numerous program modifications to provide support due to his attention and language difficulties (Dist. Ex. 2 at p. 2). The hearing record reflects that the June 2008 CSE's recommendations for refocusing and redirection, using visual aides to support auditorily presented information, providing support during transitions, repeating directions, checking for understanding, providing preferential seating close to the teacher, providing additional time to process information, providing additional time to complete written assignments, breaking down tasks into smaller segments, providing frequent sensory breaks, and previewing new information prior to instruction, which were reviewed with the Windward CSE liaison, who expressed her agreement at the June 2008 CSE meeting (Dist. Ex. 2 at p. 2; Parent Ex. E-1 at pp. 36-39). Some of the program modifications offered, including the use of visual aides, and verbal repetition of information, had been successfully implemented with the student during the 2007-08 school year at Windward (Dist. Ex. 21 at pp. 2, 4-5, 7; Parent Ex. E-1 at p. 6). Testing accommodations, to be administered by the resource consultant teacher, included extended time (1.5), a flexible setting, directions read, directions repeated and rephrased, checking for understanding, and answers recorded in the test booklet (Tr. p. 908; Dist. Ex. 2 at pp. 3, 7). The district speech-language pathologist who attended the June 2008 CSE meeting testified that the recommended program modifications and testing accommodations were appropriate for the student, based upon her understanding of his speech-language needs at the time of the meeting (Tr. pp. 2006, 2148, 2151-54).

Following a discussion of the student's social skill and behavior needs, and with further input from the Windward CSE liaison, the June 2008 CSE developed annual goals for the student to improve his ability to "communicate and interact in a socially acceptable manner with peers," "comply with classroom rules and any teacher directives," and "tolerate frustration in the classroom by a reduction of impulsivity and tantrum behavior . . ." (Dist. Ex. 2 at pp. 10-11; Parent Ex. E-1 at pp. 40-42, 46-47). Based upon the student's program at Windward, which offered indirect support from a school psychologist, and due to the student's occasional need to be removed from his Windward classroom due to his behavior, the June 2008 CSE recommended that the student receive one monthly counseling consultation session, and one individual 30-minute

counseling session per week (Dist. Ex. 2 at p. 1; Parent Ex. E-1 at pp. 40-42). The June 2008 IEP indicated that individual counseling services were recommended to address the student's "social problem solving skills and coping skills," and that the school psychologist would also "consult with [the student's] teachers and parents regarding social skills, transitions and complying with teacher requests" (Dist. Ex. 2 at p. 2). In addition to counseling services, the hearing record reflects that during kindergarten, the student's teacher and aide successfully implemented a "building level" behavior plan with the student in the classroom (Tr. pp. 1933-45, 5759-60; Dist. Ex. 42). The school psychologist testified that if a student did not respond to the building level behavior plan, a "more formal" behavioral assessment could be conducted (Tr. pp. 1614-15).

The hearing record reflects that the district speech-language pathologist believed the description of the student's needs as reflected in the June 2008 IEP present levels of performance was accurate, and that she reviewed proposed speech-language annual goals for the student with the Windward CSE liaison during the June 2008 CSE meeting (Parent Ex. E-1 at pp. 29-31).<sup>16</sup> At the meeting, the CSE liaison offered her opinion and approval regarding the proposed annual goals, which were incorporated into the student's June 2008 IEP (compare Dist. Ex. 2 at p. 10, with Parent Ex. E-1 at pp. 29-31). In addition to one individual and one group session of speech-language therapy per week, the June 19, 2008 CSE offered the student one speech-language consultation session per month (Dist. Ex. 2 at p. 2; Parent Ex. E-1 at pp. 39-40). The speech-language consultation provided the opportunity for the speech-language pathologist to discuss the student with his classroom teacher (Parent Ex. E-1 at p. 39). To address the student's visual motor integration weaknesses, graphomotor deficits, and sensory processing difficulties, the June 2008 CSE recommended that he receive two group sessions of OT per week (Dist. Ex. 2 at p. 2).<sup>17</sup> The district occupational therapist reviewed proposed annual OT goals with the Windward CSE liaison at the June 19, 2008 CSE meeting, who offered comments regarding the student's skills and her approval of the goals (Parent Ex. E-1 at pp. 31-36). The hearing record does not show that the parent expressed disagreement with the recommendations for speech-language therapy and OT services during the June 2008 CSE meeting (Dist. Ex. 2 at pp. 5-7; Parent Ex. E-1).

The Windward CSE liaison stated during the June 2008 CSE meeting that the student would benefit from receiving extended school year (ESY) services because otherwise he would regress over the summer (Parent Ex. E-1 at p. 51). She further stated that at that time, the student "could use a repetition and reinforcement of everything throughout the summer at least three times a week so that he would . . . retain all of the . . . skills that he ha[d] learned" (Parent Ex. E-1 at p. 51). In response to Windward's concerns, the June 2008 CSE offered the student three 60-minute sessions of resource room as ESY services, to address his reading/decoding skills (Tr. pp. 672-73; Dist. Ex. 2 at p. 2).

In view of the forgoing evidence, I find that the annual goals, program modifications, special education, and related services provided for in the June 2008 IEP, as described above, were adequately designed to address the student's unique needs and therefore the IEP was reasonably calculated to enable him to receive educational benefits (see Rowley, 458 U.S. at 206-07; A.C.,

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<sup>16</sup> The student did not receive "pull out" speech-language therapy services provided by a speech-language pathologist during the 2007-08 school year at Windward (Parent Ex. E-1 at pp. 12, 28-29).

<sup>17</sup> The student did not receive OT services during the 2007-08 school year (Parent Ex. E-1 at p. 31).

553 F.3d at 173; Cerra, 427 F.3d at 194-195).<sup>18</sup> Accordingly, I must annul that portion of the impartial hearing officers determination that found that the district failed to offer the student a FAPE.

## **The April 2009 CSE Meeting and IEP**

### **Evaluative Information Before the April 2009 CSE**

On April 28, 2009, the CSE convened for the student's annual review and to develop his IEP for the 2009-10 school year (Dist. Ex. 3). Attendees included the director, who participated as the CSE chairperson; the district school psychologist; a district special education teacher; a district regular education teacher; a district occupational therapist; a district speech-language pathologist; and the student's mother (Dist. Ex. 3 at p. 5). Windward's assistant head of the lower school, who was also the student's science teacher, participated by telephone (Dist. Ex. 3 at p. 5). Including the information previously obtained by the district for the student's June 2008 review described above, for the student's April 28, 2009 annual review, the CSE had also obtained the student's 2008-09 Windward progress report, which it reviewed at the meeting (Tr. p. 225-27, 3055; Dist. Ex. 23).

The student's Windward progress report reflected information about the student's progress through April 2009 (Dist. Ex. 23).<sup>19</sup> Windward personnel prepared the 2008-09 progress report using a rubric similar to the 2007-08 progress report described above (compare Dist. Ex. 21, with Dist. Ex. 23). The progress report provided detailed information regarding the student's specific skill levels in the area of language arts, which encompassed reading decoding, fluency and comprehension, spelling, handwriting, listening comprehension, and written expression (Dist. Ex. 23 at pp. 3-8). As of April 2009, the progress report reflected that the student was able to successfully apply the majority of reading decoding, and handwriting skills measured to both independent and structured activities (Dist. Ex. 23 at pp. 3-4). For the skills measured in the areas of spelling, reading fluency and comprehension, listening comprehension, and written expression at the sentence level, the student exhibited the ability to successfully complete structured activities or complete structured activities with some teacher support (Dist. Ex. 23 at pp. 4-6). In the area of written expression at the paragraph level, the progress report indicated that the student needed frequent teacher support to complete various activities (Dist. Ex. 23 at p. 7). The student's language arts teacher commented in the progress report that the student had been "progressing nicely in the full range of the language arts program," that his reading was becoming more fluent, and that he always attempted to read with expression (Dist. Ex. 23 at p. 8). The language arts teacher further indicated that the student was "usually motivated to do his best in these classes and ha[d] been trying hard to behave appropriately," noting that he was an active participant in the group (Dist. Ex. 23 at p. 8).

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<sup>18</sup> Because I find that the district's recommended program offered the student a FAPE, it is unnecessary to address the impartial hearing officer's conclusion that Windward was appropriate for a portion of the 2008-09 school year (IHO Decision at pp. 76-79), and I express no opinion on whether the IDEA permits reimbursement for a parental placement which is determined to be inappropriate for a portion of the school year.

<sup>19</sup> The director testified that as of April 28, 2009, Windward had not yet completed its annual reading and mathematics assessments of the student, and the student was not due for his triennial reevaluation from the district until October 2009 (Tr. p. 722; Dist. Ex. 3 at p. 1).

The Windward progress report reflected that by April 2009, the student was able to successfully apply his mathematics skills to the majority of tasks measured that involved numbers and operations, money, time, data, graphing, and problem solving skills, both independently and during structured activities (Dist. Ex. 23 at pp. 10-11). The student's mathematics teacher commented that the student had "made steady progress in math," and that he "underst[ood] the concepts presented and [was] able to apply them with some teacher support" (Dist. Ex. 23 at p. 11). The teacher further noted that at times, the student became "very frustrated when something [was] too difficult for him at first," and although he could become disruptive, he could be easily redirected (Dist. Ex. 23 at p. 11). She reported that the student was always willing to participate in class, and that she enjoyed having him in her class (Dist. Ex. 23 at p. 11). The student received "[c]onsistently" and "[f]requently" designations related to his ability to understand concepts and display skills in social studies, and he received "[f]requently" and "[o]ccasionally" designations regarding those same abilities in science (Dist. Ex. 23 at pp.12-13).

The director testified that her impression of the student, based on the information contained in the April 2009 Windward progress report, was that he continued to present with difficulties in spelling and written language (Tr. pp. 227-28). Although the student had exhibited progress in mathematics, he continued to require support in this area (Tr. p. 228). The school psychologist testified that the April 2009 Windward progress report indicated to her that the student was "making a lot of nice progress," and that the student exhibited difficulty with spelling and writing paragraphs (Tr. pp. 1206-07).

Regarding the student's behavior, a review of the April 2009 Windward progress report indicates that in language arts, mathematics, and science classes, the student either "[f]requently" or "[o]ccasionally" displayed positive work habits, class participation, time management skills, effort, and behavior (Dist. Ex. 23 at pp. 2, 9, 13). The student's social studies, art, music and physical education teachers reported that by April 2009, the student "[c]onsistently" or "[f]requently," exhibited positive work habits, time management skills, effort and behavior (Dist. Ex. 23 at pp. 12, 14-16). The student's homeroom teacher indicated that "[f]requently" the student displayed the ability to follow specific school routines, interact positively with adults, work independently, show awareness of and accept consequences, and seek help from a teacher when appropriate (Dist. Ex. 23 at p. 1). During homeroom, the student reportedly "[o]ccasionally" exhibited organizational skills, and the ability to positively interact and work cooperatively with peers (Dist. Ex. 23 at p. 1).

In addition to the April 2009 Windward progress report, at the April 2009 CSE meeting the CSE received information about the student's performance from the student's Windward science teacher (Dist. Ex. 3 at pp. 4-6).<sup>20</sup> According to comments contained in the April 2009 IEP,

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<sup>20</sup> Unlike the June 2008 CSE meeting, the hearing record does not contain a transcript or recording of the April 28, 2009 annual review meeting. I note that the school psychologist, who was responsible for drafting the comments section of the student's April 2009 IEP, also drafted the comments section for the student's June 2008 IEP (Tr. pp. 1152-53, 1203; Dist. Exs. 2 at pp. 5-7; 3 at pp. 5-6). A review of the school psychologist's June 2008 CSE meeting notes revealed that they closely correspond to both the transcript of the June 2008 CSE meeting, and the comments contained in the student's June 2008 IEP (compare Parent Ex. L, with Dist. Ex. 2 at pp. 5-7, and Parent Ex. E-1). A review of the school psychologist's April 2009 CSE meeting notes also closely correspond to the information contained in the comments section of the student's April 2009 IEP (compare Parent Ex. K, with Dist. Ex. 3 at pp. 5-6). The director, district speech-language pathologist, and district special education teacher who attended the April 2009 CSE meeting all testified that, to their recollection, the comments section of the student's April 2009 IEP was an accurate summary of what occurred during the meeting (Tr. pp. 228, 2164-65, 2889, 3056).

the science teacher reported that in language arts, the student received instruction in a class of seven students and two teachers (Dist. Ex. 3 at pp. 5-6). She indicated that during decoding tasks, the student used strategies he had been taught, and was able to self-correct errors (Dist. Ex. 3 at p. 6). The student reportedly read aloud with expression, and at times "exaggerate[d] his tone" (Dist. Ex. 3 at p. 6). According to the science teacher, the student's reading comprehension skills were affected by his ability to decode and his inattention (Dist. Ex. 3 at p. 6). The student was noted to make predictions with support, but at times provided irrelevant information (Dist. Ex. 3 at p. 6). His vocabulary skills were reportedly at a grade appropriate level (Dist. Ex. 3 at p. 6). The science teacher indicated that it was challenging for the student to carry over spelling rules to independent writing tasks (Dist. Ex. 3 at p. 6). The student exhibited inconsistent handwriting ability, but formed letters correctly when motivated and when he "slow[ed] down his pace" (Dist. Ex. 3 at p. 6). The student often preferred to "follow his own agenda" during writing tasks, and required teacher modeling and support to use Windward's "quick outline" (Dist. Ex. 3 at p. 6). At the time of the April 2009 CSE meeting, the student was unable to write a paragraph independently (Dist. Ex. 3 at p. 6).

According to the Windward science teacher, the student received mathematics instruction in a classroom of ten students and one teacher (Dist. Ex. 3 at p. 6). The student reportedly exhibited the ability to understand and apply concepts with frequent exposure, and compute single-step problems independently (Dist. Ex. 3 at p. 6). Multi-step problems were challenging for the student, and he needed steps broken down into smaller segments, and ongoing review to maintain his knowledge of basic facts (Dist. Ex. 3 at p. 6). The science teacher reported that graph paper had been a good tool to help the student organize numbers on paper, and that although the student benefitted from the use of manipulatives, at times it was a source of distraction (Dist. Ex. 3 at p. 6).

In science and social studies, the student "graspe[d] the concepts and vocabulary," and possessed good background knowledge (Dist. Ex. 3 at p. 6). He required support to share this background knowledge appropriately with peers (Dist. Ex. 3 at p. 6). The student preferred to follow his own agenda and at times "veer[ed] off of the topic;" requiring ongoing support to stay on task (Dist. Ex. 3 at p. 6). In art, the student exhibited an increased attention span and motivation (Dist. Ex. 3 at p. 6). He demonstrated difficulty following multi-step directions and working cooperatively during physical education (Dist. Ex. 3 at p. 6). Maintaining attention and working cooperatively during music instruction was also challenging for the student (Dist. Ex. 3 at p. 6).

Regarding the student's behavior, the science teacher reported that the student was a hard worker who was eager to please his teacher (Dist. Ex. 3 at p. 6). At times he could "get easily upset" when something did not "meet his agenda," and competitive situations were especially challenging for the student (Dist. Ex. 3 at p. 6). Although the student wanted to express his own ideas, at times he "lack[ed] awareness of his environment" (Dist. Ex. 3 at p. 6). The student exhibited impulsive behaviors and was easily distracted, requiring redirection during the school day (Dist. Ex. 3 at p. 6). The school psychologist's impression of the Windward reports at the April 2009 CSE meeting was that the student exhibited more behavioral challenges during the second half of the school year (Tr. pp. 1206-07). The school psychologist specifically recalled that the student inconsistently completed homework, that he struggled with competitive peer situations, that he wanted to do things his way, and that his "rigidity" was "getting in the way for



him" (Tr. pp. 1207-09). The Windward reports suggested to the school psychologist "consistent themes in [the student's] behavioral patters in school" (Tr. p. 1208).<sup>21</sup>

### **The April 2009 IEP**

A review of the April 2009 IEP present levels of academic achievement, social development, physical development, and management needs generally reflects the information discussed above, that the CSE had obtained prior to and during the April 2009 CSE meeting (compare Dist. Ex. 3 at pp. 3-6, with Dist. Ex. 23; see Dist. Exs. 10-15; 19-22). The director, the school psychologist, the speech-language pathologist, and the district special education teacher who attended the April 2009 CSE meeting testified that the present levels of performance contained in the April 2009 IEP were accurate summaries of what they understood the student's skills and needs to be at that time the IEP was formulated (Tr. pp. 228-29, 1209, 2006, 2169-70, 3061-63). The hearing record reflects that the Windward science teacher participated in the development of the student's 2009-10 annual goals related to the student's needs in the areas of attention, classroom transitions, reading decoding and fluency, spelling, written expression, mathematics, auditory comprehension, expressive and receptive language, pragmatic language and social skills, visual motor and graphomotor skills, and sensory processing abilities (Tr. pp. 3053-54, 3060; Dist. Ex. 3 at pp. 6-13). I note that the impartial hearing officer determined that, based upon the district's knowledge of the student's needs at the time of the April 2009 CSE meeting, the annual goals were appropriate, and the parent has not appealed from that decision (IHO Decision at p. 83; see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

For the 2009-10 school year, the CSE recommended that the student receive a general education program with daily 45-minute sessions of 15:1 resource consultant teacher services in a separate location (Dist. Ex. 3 at p. 1). The hearing record reflects that the resource consultant teacher services recommended for the 2009-10 school year were similar to those recommended by the CSE for the 2008-09 school year, and were offered to support the student's reading, writing, mathematics, and study skill needs (Tr. pp. 231-32, 1210-11; Dist. Ex. 3 at p. 2). Additionally, the April 2009 IEP indicated that resource consultant teacher sessions were an "opportunity to provide [the student] with opportunities for pre-teaching and re[-]teaching of skills addressed in the classroom" (Dist. Ex. 3 at p. 2). The director testified that the recommendation for placement in general education with resource consultant teacher services was due to the student "clearly [having] the cognitive ability to acquire skills, and [the] academic performance consistent with that ability" (Tr. p. 232).<sup>22</sup> She further testified that according to the progress reports the student had "achieved," and that his needs could be supported by the goals developed by the CSE, which could "certainly be implemented by a special education teacher" (Tr. pp. 230, 232). The special education teacher who attended the April 2009 CSE meeting, and who would have been the student's 2009-10 resource consultant teacher had he attended the public school, testified that the daily resource consultant teacher services set forth in the IEP were appropriate because the annual goals developed for the student, which had been developed based upon the April 2009 Windward progress report and information provided by Windward personnel at the meeting, "could be

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<sup>21</sup> The hearing record supports the impartial hearing officer's finding that the degree to which the student's behavior had deteriorated while he attended Windward was not shared with the district representatives at the April, 2009 CSE meeting (Tr. pp. 3510-12, 3538-39, 4286-87, 4429-33, 4835-41, 5514-16; IHO Decision at pp. 79-81).

<sup>22</sup> Additionally, the director noted that in the general education environment, the student would be provided with the opportunity to be educated with "typically and atypically developing peers" (Tr. p. 231).

delivered in the time frame recommended" (Tr. pp. 3057-58, 3060-61, 3063). She further testified that based upon what she knew about the student at the time of the April 2009 CSE meeting, the student did not appear to require greater support and that he was similarly situated to other students who received a resource consultant teacher program (Tr. p. 3065).

Regarding the April 2009 CSE's recommendation that the student receive full-time shared aide services, the director testified that based on reports, the student continued to exhibit difficulty with transitions and behavior, and that he required redirection and refocusing to meet his attention needs (Tr. pp. 234, 240; see Dist. Ex. 3 at p. 5). The April 2009 IEP indicated that the shared aide would provide the student with support during transitions both in and out of the classroom, assist the student in maintaining focus and control in order to complete academic tasks, and help to monitor and moderate classroom behavior (Dist. Ex. 3 at pp. 1-2). The director stated that the shared aide would "really be able to, in a subtle way, support [the student], again in multiple environments" such as the general education classroom and special class environments (Tr. p. 240). The school psychologist testified that she was responsible for supporting and training the aide regarding appropriate ways to redirect the student, assist him with transitions, increase his independence, navigate peer relationships, and manage his frustration (Tr. pp. 1211-12). She further testified that the aide would be essential in helping the student with those skills (Tr. p. 1212). Accordingly, part of the school psychologist's consultation sessions, had the student received the services on the IEP, would have focused on "working with the aide," to increase the student's independence, and to help the aide "take a little bit of a step back hopefully so the child can grow" (Tr. p. 1212).

To provide the student with additional support beyond the resource consultant teacher and shared aide services, the April 2009 IEP continued to offer program modifications similar to those offered in the student's June 2008 IEP (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 3 at pp. 2-3). Additions specific to the April 2009 IEP included providing examples of using manipulatives and graph paper, and providing pre-teaching and re-teaching opportunities, which appear to stem from specific information that Windward personnel provided to the CSE regarding the student's skills and needs (Dist. Ex. 3 at pp. 2-4). Both the speech-language pathologist and the special education teacher who attended the April 2009 CSE meeting testified that, based upon the information before them, they agreed with the program modifications recommended for the student, which had been developed with the participation of the student's Windward science teacher (Tr. pp. 1215, 2164, 2167-68, 3082-83). Testing accommodations recommended in the April 2009 IEP remained consistent with those offered in the June 2008 IEP, and the special education teacher and school psychologist testified that they were appropriate based upon the information known about the student at the time of the April 2009 CSE meeting (Tr. pp. 1216, 3088; compare Dist. Ex. 2 at p. 3, with Dist. Ex. 3 at p. 3).

In addition to the special education supports described above, the director testified that the one weekly group counseling session and the one monthly counseling consult session were designed to address the student's social needs (Tr. pp. 230-31; Dist. Ex. 3 at p. 1). The school psychologist testified that the CSE changed the student's recommended weekly counseling service from individual to group based upon information from Windward that highlighted the student's difficulty cooperating with peers and developing social skills (Tr. p. 1217; compare Dist. Ex. 2 at p. 1, with Dist. Ex. 3 at p. 1). The April 2009 IEP indicated that the group counseling services were designed to "address social problem solving skills, coping skills and the ability to play cooperatively," areas of need identified at the April 2009 CSE meeting (Dist. Ex. 3 at pp. 2, 5-6; see Tr. pp. 239, 1213-14; Dist. Ex. 23). The school psychologist testified that the student exhibited

continued needs in the areas of managing frustration, working with peers, and complying with teachers; and that group counseling was "a great way to work on the social skills piece, working cooperatively . . . pragmatic skills in terms of turn taking, listening to the speaker . . . being a team player" (Tr. pp. 1213-14). She opined that "those kinds of skills would have been great to do in a group setting" (Tr. p. 1214). In addition to supporting the student's shared aide, the counseling consult session was designed to help generalize the skills addressed within the group counseling sessions to other environments, and to support other personnel who worked with the student (Tr. pp. 239-40). The April 2009 IEP indicated that the school psychologist would "consult with the student's teachers and parents regarding social skills, transitions and complying with teacher requests" (Dist. Ex. 3 at p. 2).

The district speech-language pathologist testified that she reviewed her proposed speech-language annual goals with Windward personnel during the April 2009 CSE meeting, to determine whether they were appropriate based upon their perception of the student's needs (Tr. p. 2170). The April 2009 IEP indicated that the speech-language therapy services would address the student's receptive, expressive, and social language skills (Dist. Ex. 3 at p. 2). The speech-language pathologist stated that her recommendations for one session each of weekly group and individual speech-language therapy, and one monthly speech-language consult session "to find out how [the student] was doing in the classroom," would best meet the student's needs (Tr. p. 2167; Dist. Ex. 3 at p. 2). Regarding the student's OT needs, the April 2009 IEP indicated that "[a]ccording to Windward, [the student] continue[d] to have difficulties with visual motor, sensory motor and graphomotor skills which affect his daily performance in the classroom and at home" (Dist. Ex. 3 at p. 3). The CSE recommended that the student receive two weekly sessions of group OT to address his visual motor integration weaknesses, graphomotor deficits, and sensory processing skills (Dist. Ex. 3 at p. 2).

According to the director, at the April 2009 CSE meeting the student's Windward science teacher shared that the student continued to have difficulty in specific areas of reading and writing, therefore, the CSE offered the student three 60-minute sessions of ESY resource room services per week in order to support the IEP reading and writing annual goals and to prevent substantial regression (Tr. pp. 241-42).

In summary, despite the impartial hearing officer's concerns that the student's needs required an increasing amount of services (IHO Decision at pp. 72-76), the hearing record reflects that the district responded to the information available at the time the IEP was formulated and adjusted the student's special education and related service recommendations accordingly, frequently due to input from Windward personnel regarding the student's performance (Tr. pp. 257-68, 665-67, 1204; compare Dist. Ex. 1 at pp. 1-2, with Dist. Exs. 2 at pp. 1-2, and 3 at pp. 1-2; see generally Parent Ex. E-1). The hearing record as a whole reflects that the June 2008 IEP and the April 2009 IEP, based on the information available to the CSE at the time they were developed (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65; D.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595, 598 [2d Cir. 2005]; Mrs. B., 103 F.3d at 1120; Application of a Student with a Disability, Appeal No. 10-085), offered the student special education programs and related services that were reasonably calculated to enable the student to receive educational benefits.

### **Evaluations Conducted Subsequent to the April 2009 CSE Meeting**

Although not relevant to my determination that the district offered the student a FAPE, I note that, at the time of the April 2009 CSE meeting, the parents were in the process of obtaining

a series of private evaluations of the student (Parent Exs. B-1; B-3; B-4; C). The director and the school psychologist testified that the student's mother did not inform the CSE prior to or at the April 2009 CSE meeting that the student was undergoing such evaluations (Tr. pp. 281-82, 942-43, 1183, 1200-01, 1297-98). The director further testified that the district did not conduct additional evaluations of the student at the time of the April 2009 CSE meeting because there was no indication from the evaluative information before them, the parents or Windward personnel that additional assessments were in order (Tr. pp. 924-25).

Beginning in March 2009, the school psychologist attempted to obtain consent from the parents to conduct a classroom observation of the student at Windward; however, because the parents' consent for the observation was contingent upon their private consultant accompanying the school psychologist at the observation, it was not completed until June 11, 2009 (Dist. Exs. 35; 36; 37; 40 at pp. 2-28; see Tr. p. 3548 [the mother would not allow the school psychologist to conduct the observation without the private consultant so as "to ensure accuracy on the observation"]). At the observation, the student's Windward teacher informed the school psychologist that the student was experiencing a "very off and out of character day," and therefore, her observation may not be typical of how the student presented in school (Tr. pp. 1219-20; see Dist. Ex. 37). The school psychologist's classroom observation report indicated that the student exhibited "fidgety/restless" and disruptive behaviors, made inappropriate comments, and repeatedly interrupted the teacher despite numerous attempts at redirection (Dist. Ex. 37). The school psychologist testified that she did not believe she obtained a "typical picture" of the student during the June 11, 2009 observation; however, because it was the end of the school year, she did not have the opportunity to conduct a second observation of the student (Tr. pp. 1222-23). She stated that had the observation been conducted when she first requested consent to do so, she "would have gone back another time to see how [the student] looked another day" (Tr. p. 1223).

The hearing record reflects that the district received the private evaluation reports on July 30, 2009 (Tr. pp. 956-62; Parent Exs. B-1; B-2; B-3; B-4). The director testified that the evaluation reports were provided by the parents, without an accompanying cover letter or note from them (Tr. p. 289, 943). By letter dated August 26, 2009, the district invited the parents to attend a CSE meeting scheduled for September 8, 2009, to review the private evaluation reports (Tr. p. 289; Dist. Ex. 30).<sup>23</sup> In an e-mail dated August 31, 2009, the parents informed the director that they had received the CSE meeting invitation; however, they were "not available on that date" and indicated that they would contact her with alternative dates to conduct the meeting (Dist. Ex. 29; see Tr. pp. 289-90). The director testified, and the mother confirmed, that the parents did not contact the district with alternative dates for a CSE meeting (Tr. pp. 290, 4726-28).

## **Conclusion**

The parents' claims for the 2007-08 school year are time-barred and, having found that the district offered the student a FAPE for the 2008-09 and 2009-10 school years, it is unnecessary to address the appropriateness of the parents' unilateral private placements for those years or whether equitable considerations support the parents' claim, and the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the

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<sup>23</sup> The director indicated that the September 8, 2009 CSE meeting date was prior to the beginning of the 2009-10 school year (Tr. p. 289).

Bd. of Educ., Appeal No. 11-016). I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the portions of the impartial hearing officer's decision, dated May 4, 2011, which determined that the district failed to offer the student a FAPE for the 2008-09 and 2009-10 school years and ordered the district to pay a portion of the student's tuition costs at Windward and Eagle Hill are annulled.

**Dated:**            **Albany, New York**  
                      **July 20, 2011**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**